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No. 85-1463

In the Supreme Court of the United States

OCTOBER TERM, 1985

M. GILDA MARQUES, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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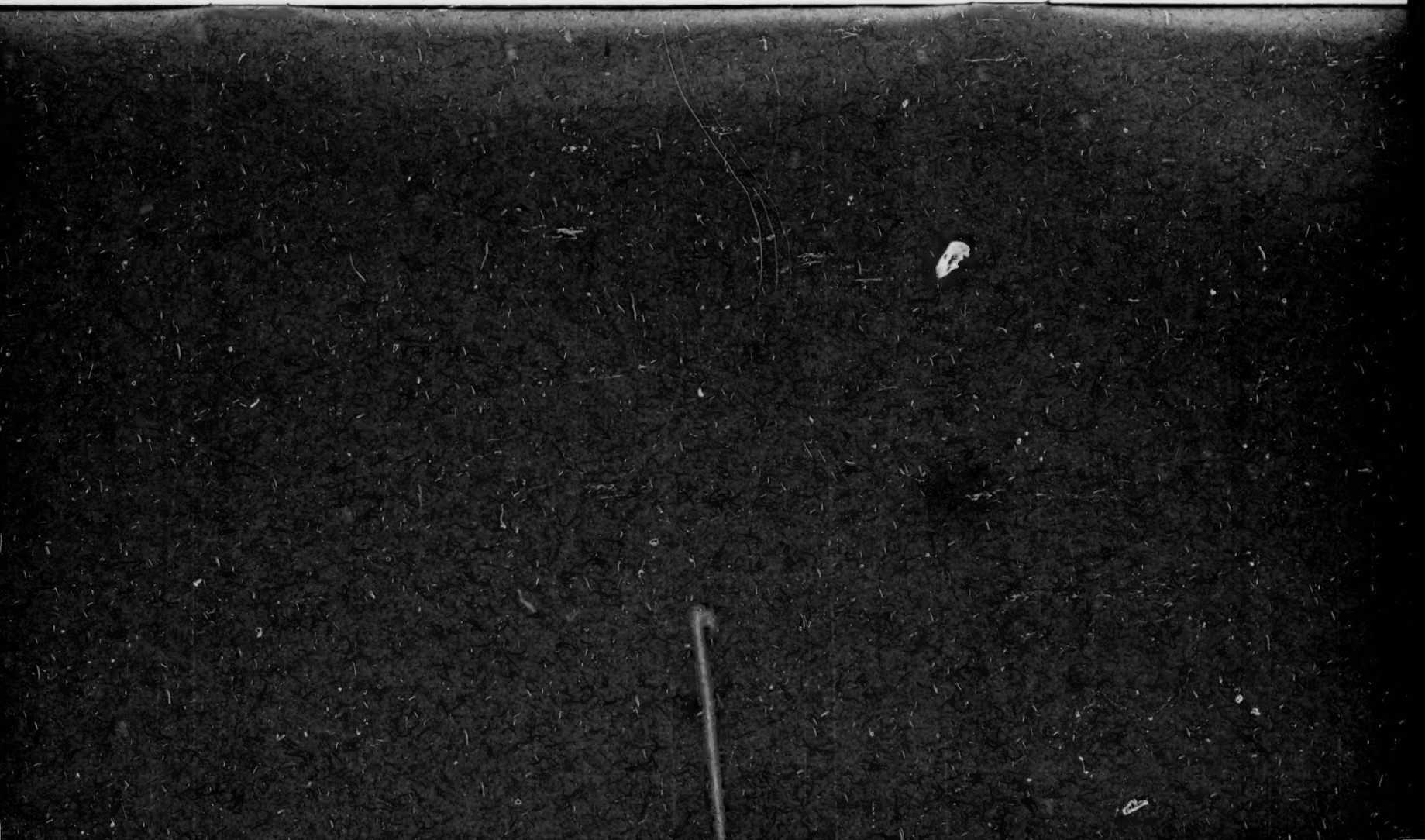

QUESTION PRESENTED

Whether the court of appeals correctly held that a federal agency that has denied a within-grade increase to an employee may defend its action before the Merit Systems Protection Board by adducing substantial evidence that it properly denied the increase.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. 43a-59a) is reported at 22 M.S.P.R. 129. An earlier opinion of the presiding official of the Merit Systems Protection Board (Pet. App. 14a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1985. Petitioner's request for rehearing was denied and her suggestion for rehearing en banc was declined on December 2, 1985 (Pet. App. 60a-61a). The petition for a writ of certiorari was filed on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of 5 U.S.C. 5335(c) and 7701(c)(1) are reproduced at pages 3 and 4 of the petition.

SENT

Petitioner's employer epartment of Health and Human Services (HHS d her performance of a "critical element" of her nance rating plan" — planning, organizing, and sch work assignments — to be "unacceptable" (Pet. Ap 22a). Rather than remove her or reduce her grade, erely denied her a within-grade step increase from Step 9, to GS-12, Step 10, on the date when she wo e been eligible (*id.* at 16a). Petitioner sought and wa a hearing before the Merit Systems Protection Boar PB).

The MSPB presiding determined that HHS was required to prove by sul l evidence that it properly withheld petitioner's wit de increase and that HHS carried its burden (Pet. 7a, 32a-34a). The MSPB denied a petition for rev hout deciding between the "substantial evidence" an onderance of the evidence" standards, holding that ction was sustainable even under the latter standar at 51a-52a). The court of appeals unanimously ag at "substantial evidence" was the correct standar at 2a-3a, 13a). The court affirmed, with one judge ing on the basis that there was not substantial evid the unacceptable performance. Petitioner has no that issue in this Court.

A NT

The decision of the f appeals, affirming the MSPB's use of the substa idence standard in reviewing denials of within-grad ases, is correct. Moreover, the Federal Circuit has e jurisdiction over appeals from MSPB decisions in s es (see 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9)) erpretation of the MSPB's enabling statute therefo natter within that court's special competence.

1. Having found petitioner's performance of a "critical element" to be "unacceptable," HHS was authorized under the Civil Service Reform Act of 1978 (CSRA) to remove her from the service or reduce her grade. 5 U.S.C. 4303(a); 5 U.S.C. 4301(3); *Lovshin* v. *Department of the Navy,* 767 F.2d 826, 834 (Fed. Cir. 1985), cert. denied, No. 85-882 (Apr. 7, 1986). Had it done so, it would have been required to prove before the MSPB by "substantial evidence" that her performance was in fact unacceptable. 5 U.S.C. 7701(c)(1)(A). HHS instead imposed the lesser sanction of denial of a within-grade increase. Petitioner argues that this lesser sanction required HHS to meet the higher standard of "preponderance of the evidence." The CSRA does not require that absurd result.

To be sure, the CSRA declares that "substantial evidence" is to be the standard "in the case of an action based on unacceptable performance described in section 4303 of this title" and "preponderance of the evidence" is the standard "in any other case" (5 U.S.C. 7701(c)(1)(A) and (B)). Section 4303 lists only the most severe sanctions, removal and reduction in grade, and omits explicit mention of denials of within-grade increases. But just last Term, this Court definitively rejected an approach to the CSRA that requires adherence to a literal reading divorced from legislative purpose. " 'Congress failed to address specifically how the mechanics of the [CSRA] would function in certain situations,' and the judicial task therefore is to ' "look to the provisions of the whole law, and to its object and policy." ' " *Lindahl* v. *Office of Personnel Management,* No. 83-5954 (Mar. 20, 1985), slip op. 23-24. The case the Court quoted to support this approach to CSRA construction was *Meyer* v. *Department of Health & Human Services,* 666 F.2d 540, 542 (Ct. Cl. 1981) (quoting *Richards* v. *United States,* 369 U.S. 1, 11 (1962)).

Meyer involved the precise question that petitioner seeks to raise here, and the court determined that "substantial evidence" is the proper standard of review of denial of within-grade increases. It relied principally on the legislative history and the purpose of the CSRA. The Senate report stated that "[t]he actions [under 5 U.S.C. 4303] *primarily* contemplated are reduction in grade or dismissal from the service" (S. Rep. 95-969, 95th Cong., 2d Sess. 42 (1978) (emphasis added)), and therefore, "while Congress' attention was directed at removal and demotion actions, it wanted section 4303 to be applicable to all performance actions" (666 F.2d at 544). In addition, the pre-CSRA standard for reviewing denials of within-grade increases was whether they were "arbitrary and capricious" (*id.* at 543). Since the impetus for the Act was Congress' "desire to give supervisors more latitude in personnel actions and employees more effective appeal rights," the court found it "absurd" to conclude that "Congress, while decreasing or maintaining the agency employer's burden of review for all other personnel actions, intended * * * to increase the agencies' burden of review from the lowest standard * * * to the highest" in within-grade increase denials (*id.* at 544).

In *Romane* v. *Defense Contract Audit Agency*, 760 F.2d 1286, 1288 & n.* (1985), the United States Court of Appeals for the Federal Circuit expressed its conviction that *Meyer* was correctly decided, and no judge of the en banc court voted to hear a challenge to *Meyer*. In the present case, the court relied on *Romane*.

We submit that the result reached in *Meyer* and *Romane*, applying an approach to CSRA construction that this Court has specifically endorsed, is correct. In addition, it is the result consistently reached by the MSPB since shortly after the enactment of the CSRA. See *Parker* v. *Defense Logistics Agency*, 1 M.S.P.B. 489, 504 (1980). The MSPB's

consistent interpretation is, of course, entitled to substantial deference. As the court stated in *Frazier* v. *MSPB*, 672 F.2d 150, 162 (D.C. Cir. 1982), the MSPB was charged with putting the machinery of the CSRA in motion while still untried and new, and its contemporaneous construction of the CSRA is entitled to deference even beyond the "usual policy." This expert agency's rejection of the "preponderance" standard in denials of within-grade increases has been consistently affirmed by a court that, because of its exclusive jurisdiction over MSPB appeals,* is itself expert. Accordingly, there is no substantial argument that this case was wrongly decided.

2. Three courts have disagreed with the Federal Circuit, and petitioner relies on those courts' decisions to claim a "conflict in the Circuits" (Pet. 17). *White* v. *United States Department of the Army*, 720 F.2d 209 (D.C. Cir. 1983); *Stankis* v. *EPA*, 713 F.2d 1181 (5th Cir. 1983); *Schramm* v. *Department of Health & Human Services*, 682 F.2d 85 (3d Cir. 1982). Those decisions, however, present no danger of inconsistency in future application of the law because those courts no longer have jurisdiction over MSPB appeals. Even petitioner recognizes this fact. Pet. 17. Congress recognized that "there are areas of the law in which the appellate courts reach inconsistent decisions" (S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981)) and created the United States Court of Appeals for the Federal Circuit precisely because of the need — "short of the Supreme Court" (*ibid.*) — for a forum to provide definitive, uniform answers to questions in certain subject areas. The exclusive jurisdiction of the Federal Circuit over MSPB cases is no "accidental effect" (Pet. 18); it is Congress' chosen means to relieve this Court of the burden of resolving intercircuit conflicts in such cases.

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*5 U.S.C. 7703(b)(1); 28 U.S.C. 1295(a)(9).

The decisions on which petitioner relies cast no serious doubt on the correctness of the decision below. Each court rejected the *Meyer* approach and read the Act literally, recognizing that a literal reading produced anomalous results but disclaiming authority to follow the object and policy of the Act. One court candidly admitted that "[t]he legislative history is replete with * * * references to the lesser standard to be applied in performance related cases" (*Schramm*, 682 F.2d at 89). Another conceded that "[i]t might well be that Congress intended the substantial evidence standard to apply to all cases involving an employee's failure to meet required performance levels" (*Stankis*, 713 F.2d at 1186). The third said that *Meyer's* conclusion—that use of the substantial evidence standard is " 'more in line with the general scheme of the act' " — "may be true" (*White*, 720 F.2d at 213). This Court has made it clear that the *Meyer* approach—and not the one taken by these courts—is correct (*Lindahl*, slip op. 23-24).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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